all quite too indifferent to the general effect of so magnifying the authority and wisdom of the common schools in the eyes of the children, above their parents, in all matters even remotely pertaining to education, and at the same time teaching the children that mere text-book knowledge is superior to all other attainments. There can be little doubt, this may have contributed more than we comprehend to that general disregard and disrespect among the young toward their elders, which is so much deplored by many. But when it comes to the matter of religious teaching, which is so exclusively under the control of the parents, and by the very organic law of the state made sacred above all other rights, it might be supposed no one could fail to comprehend the unreasonableness of the claim here made. What is said in the Constitution of the state about the duty of maintaining schools, and the consequent necessity of their claims being vindicated by the courts, is all very well. But it must be remembered that the provisions in the Constitution about schools are subordinate to those securing freedom of religious worship. And if we make the case under consideration our own, we shall all be able to comprehend that the demands of the school authority here were most unreasonable and without either law or necessity. We think it unfortunate, both for the interests of the schools and the quiet and good order of the country, that any class of Christians should have been subjected to such hard measures in defining religious freedom, the thing above all others of which we boast the loudest. It seems to us far wiser to mete out to all the most liberal measures upon this subject, especially where, as in the present case, it must be conceded by all that they offer a very plausible, if not, as we think, an invincible legal vindication of their claim. By so doing we shall be able to secure the support of the clearest popular conviction in support of the decisions of the courts, in refusing all countenance towards clearly unreasonable and illegal demands of that character.

I. F. R.

Supreme Court of New Brunswick.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY *v.* GEORGE McLEOD.

The plaintiff company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held*, that this was an offer made by the company on the one side, and accepted by the defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments.

Held, also, that it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable.

THIS was an action of debt to recover a balance alleged to be due from the defendant as a subscriber for stock in the European and North American Railway Company.

It appeared at the trial that a meeting to organize the plaintiff company under the Act of Incorporation was held on the 30th May 1864, when directors were chosen, a secretary and treasurer

appointed, and by-laws passed defining the duties of the president and secretary, the mode of calling special meetings, the form of certificates of shares and the manner in which they were to be signed, &c. A committee was also appointed to obtain subscribers for stock. The persons who agreed to take stock in the company subscribed their names on a sheet of paper, called "The Stock Subscription List," which had the following heading:—

"The European and North American Railway Company for extension from St. John, westward.

"We, the following persons, whose names are subscribed hereto, do hereby agree to take, and do take, the number of shares in the capital stock of the aforesaid company set opposite to our respective names, subject to the aforesaid Act of Assembly incorporating said company, and the aforesaid by-laws of the said company and the laws of this province."

Shares, $50 each.

Among a large number of subscribers in this list, the defendant's name appeared as a subscriber for ten shares—his name, occupation, and the number of shares, all being in his own handwriting.

Evidence was given that assessments had been made and failure by defendant to pay.

ALLEN, J., after stating the pleadings and facts in the case, continued:—The first question is, whether the defendant was a stockholder in the company? I think there is a clear distinction between this case and the English cases that have been referred to. There is nothing in the act incorporating this company, or in any of our acts relating to corporations generally, defining what shall constitute a stockholder. Both the act of incorporation, and the Act 32 Vict. c. 54, speak of "subscribers" for stock, and of the stock being "subscribed for;" and many other acts of incorporation use similar expressions, tending to show, it seems to me, that when a company is about being organized, and persons are asked to take stock in it, and subscribe their names to a paper prepared for that purpose, agreeing to take a certain number of shares, if the company is organized under its charter, the persons so subscribing their names become liable as stockholders in the company. It is an offer made by the company on one side, and accepted by the person so subscribing his name, on the other, and therefore becomes a complete contract. This, in my opinion, constitutes the

distinction between this case and *Pellatt's Case*, Law Rep. 2 Ch. 527; *Gunn's Case*, Law Rep. 3 Ch. 40, and a number of other English cases, decided under the Winding-up Act. In each case, the question is, whether there is a contract. Lord CAIRNS says in *Pellatt's Case:* "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract. * * * I cannot, therefore, consider an application for shares, followed by a registration, not communicated to Mr. Pellatt, to constitute a complete transaction." But where, as in the present case, the authorized agents of a company apply to an individual and request him to take shares in the company, and he assents, and subscribes his name to the stock-list, stating the number of shares he agrees to take, what more is needed to complete the transaction? Had the defendant in this case applied to the company for shares, then I admit there would have been no contract until they assented, and communicated their assent to him; but that is not the state of facts here. It is also contended that the shares should have been numbered, and that the defendant was not a stockholder until the company assigned ten shares to him, distinguished by certain numbers. But where is the obligation to number them? The act of incorporation does not require it. It is true, the by-laws of the company contemplate that certificates of stock should be issued to the stockholders, and the form of certificate shows that it was intended that the shares should be distinguished by numbers; but would the omission of the company to issue a certificate, or to describe in it the numbers of the shares, or to misdescribe the numbers, deprive a stockholder of his shares? I think not. The certificate does not constitute the contract between the company and the shareholder, though it may be evidence of it against the company. It was also contended that unless the shares were numbered, they could not be seized under an execution, as provided by 1 Rev. Stats., cap. 119. But I do not assent to that proposition. I see no difficulty under that act in seizing shares in a company, though they are not distinguished by any particular numbers. The act says, that "The shares of stock of every stockholder in every incorporated joint-stock company, shall be personal estate and liable to be seized and sold as such. The officer executing the execution shall leave a certified copy thereof with the clerk, secretary or cashier of the corporation,

who shall give the sheriff a certificate of the number of shares held by such execution-debtor; and the shares therein so liable shall be deemed seized when such copy is left, and shall be sold, &c.; and on producing a bill of sale from the sheriff, the officer of the corporation, whose duty it is to register the transfer of shares, shall transfer to the purchaser the shares so sold." Now, what more is necessary than that the officer of the company should give the sheriff a certificate stating how many shares the debtor owns? And if they have never been numbered, or, if numbered, the officer does not state the numbers in his certificate, but merely states (what the act requires of him) that the debtor holds five or ten shares, as the case may be, will that prevent the sheriff from selling those five or ten shares, and the purchaser from being registered as the owner of them in place of the original holder? If the shares were of different values, then I could understand the necessity of numbering them, to distinguish one class from the other; but where all are of equal value it would seem to be immaterial whether they were numbered or not—the sheriff could sell the whole, or a certain number of the shares, and no confusion could arise for want of their being numbered. The cases of *The Newry & Enniskillen Railway Co.* v. *Edmonds*, 2 Exch. 118; *The Wolverhampton Waterworks Co.* v. *Hawksford*, 7 C. B. N. S. 795, and *The Irish Peat Co.* v. *Phillips*, 1 B. & S. 629, have been relied on by the defendant's counsel; but two of these cases turned upon the particular words of "The Companies Clauses Consolidation Act," which declares in sect. 8, that every person who had subscribed the prescribed sum to the capital of the company, and whose name had been entered on the register of shareholders, should be deemed a shareholder of the company; and in sect. 9, that the company should keep a book to be called "The Register of Shareholders," in which should be entered the names and additions of the persons entitled to shares in the company, together with the number of shares to which such shareholder should be entitled, *distinguishing each share by its number*, and that the book should be authenticated by the seal of the company affixed thereto. In actions for calls in the first two of these cases, it was held, that to constitute a person a holder of shares, the company was bound to prove that his name was on the register. It is true, that ERLE, C. J., in delivering judgment in *The Wolverhampton Waterworks Co.* v. *Hawksford*, says, "No shares had been num-

bered, and no specific shares had been appropriated;" but the real ground of the decision was, that the defendant's name was not on any register of shareholders, such as the company was required by the act to keep; this appears by the judgment of the Exchequer Chamber in *The Irish Peat Co.* v. *Phillips*, where it is said that *The Wolverhampton Waterworks Co.* v. *Hawksford* was no authority for the decision of the Court of Queen's Bench; which was, that shares were not created so as to make the alleged owner liable for calls thereon until the shares were specifically numbered and appropriated by number. In the case of *The Irish Peat Co.* v. *Phillips*, the charter of the company required that all proprietors of stock should execute a deed of settlement, whereby the capital should be divided into a certain number of shares, to be numbered in regular succession, beginning with No. 1. A deed of settlement was prepared containing these provisions (substantially the same as "The Companies' Clauses Consolidation Act)," but the defendant did not execute it; and on that ground it was held that he was not a shareholder, nor liable for calls. Neither of these cases, then, seems to me to support the position taken, that the defendant in this case is not liable because no shares were numbered by the company, and, as such, allotted to him; and I am unable to come to the conclusion, that a numbering of the shares was essential to constitute him a stockholder. But in addition to this, the act of incorporation says, that if "any *subscriber*, or stockholder," shall neglect to pay any assessment on his shares, the directors may order such shares to be sold, and if there is any deficiency, "such delinquent *subscriber* or stockholder shall be held accountable," &c. The Act 32 Vict., c. 55, uses the terms, "subscribers for shares," and "subscribers to the capital stock;" and the third section authorizes the company to sue for, recover and receive "from any subscriber the amount due for unpaid subscribed stock which may have been subscribed for by such subscriber." Surely it cannot be disputed that the defendant was a subscriber for stock in this company, even if any doubt could exist about his being a stockholder. In the report of the case of *The Wolverhampton Waterworks Co.* v. *Hawksford*, in 6 C. B. N. S. 336, on demurrer to the declaration, the judgment for the defendant was put expressly on the ground that the statute gave the remedy for calls against "shareholders" only, and not against "subscribers" simply; and the declaration did not allege that the defendant was a "stockholder."

But by the act under consideration the power to sue is not confined to stockholders, but is expressly given against subscribers; and therefore whether the words "subscriber" and "stockholder" were used indiscriminately in the act, and as pointing to the same set of persons, as was said in *The West London Railway Co.* v. *Bernard*, 13 Law J. Q. B. 68, or otherwise, seems to me to be immaterial. As regards their liability to pay calls, I think there is no distinction between a subscriber for stock and a stockholder. For these reasons I think this objection ought not to prevail.

The next objection was, that the stock was subscribed subject to the provisions of the act of incorporation and the by-laws of the company; that they formed conditions precedent to the defendant's liability, and that the company had not performed the conditions. These alleged conditions are to be found in the second section of the act of incorporation, which declares that the capital stock of the company shall consist of $2,000,000, to be divided into forty thousand shares of $50 each; and in the fifth section, which authorizes the president, directors and company "to make such equal assessments from time to time *on all the shares* in the said corporation as they may deem necessary and expedient." The objection is, that the first assessment made on the 16th July 1867, was not an equal assessment on *all the shares*, because it expressly excluded the $250,000 of stock subscribed in the United States. If this objection is not cured by the Act 32 Vict., c. 54, I think it must prevail. * * * [The judge's description of the act is omitted as not of general interest.]

On this ground, therefore, I think the first assessment was illegal. But admitting the first assessment to be bad, on account of the exclusion of the subscribers for stock in the United States, will the inclusion of that assessment in the notice which was given by the president of the company, under the Act 32 Vict., c. 54, and the sale of the defendant's stock for the non-payment of that, together with the nine subsequent assessments, vitiate the sale? It seems to me that it will not do so. The objection of inequality does not apply to any but the first assessment; and there is no such connection between them as that one defective assessment should destroy all the others. Each one stands on its own merits, and, if legally made, gives a separate cause of action, though a preceding one may be defective. For the payment of such as were

legally made and notified, a shareholder would be liable—for the others he would not. The defendant clearly was a defaulter for non-payment of nine assessments, and for such default the company had a right to sell his shares, and I cannot think that where they had such right, and where there clearly was a balance (without including the first assessment), for which the defendant was liable in an action, that the plaintiffs claiming against him in that action a larger sum than they had a right to, is a ground for setting aside the verdict; it only affects the amount to be recovered. The plaintiff, in an action of this nature, may prove and recover less than the sum stated to be due in his declaration: 1 Chit. Pl. 114; and "if the plaintiff states as a cause of action more than is necessary for the gist of the action, the jury may find so much proved, and so much not proved, and the court would be bound to pronounce judgment for the plaintiff upon that verdict, provided the facts proved constituted a good cause of action:" per HOLROYD, J., in *Bromfield* v. *Jones*, 4 B. & C. 385. Now, in my opinion, the facts proved in this case constituted a good cause of action, as to all except what was claimed on account of the first call, and the jury had a right to find all except that proved. Instead, therefore, of the defendant being liable for the assessments on the full amount of his subscribed stock, he is only liable for the deficiency remaining on the nine assessments, after deducting the amount realized from the sale of his shares, with interest and expenses.

My brother WELDON has stated that, in his opinion, the notice given by the president, under the Act 32 Vict., c. 55, is insufficient. No objection to the form of the notice was taken at the trial, or on the argument; and though probably it might have been more artificially drawn, I am inclined to think it contains substantially all that the act requires.

For these reasons, I think the rule should be discharged, and that the verdict should be reduced by the amount of the first assessment, unless the agreement entered into at the trial precludes such a mode of dealing with the case.

RITCHIE, C. J., concurred. WELDON, J., dissented.